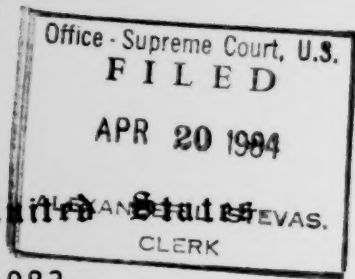


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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983



NO.

LOUIE L. WAINWRIGHT,
Secretary, Department
of Corrections, State
of Florida,

Petitioner,

-v-

ROBERT LARRY CROW,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JIM SMITH
Attorney General

GREGORY C. SMITH
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COUNSEL FOR PETITIONER

The Capitol
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ISSUE

WHETHER THE ELEVENTH CIRCUIT PRO-
PERLY HELD THAT FLORIDA'S PROSE-
CUTION OF RESPONDENT FOR DEALING IN
STOLEN PROPERTY, i.e., CONTRACTURAL
RIGHTS OF RECORDING ARTISTS, IS
PREEMPTED BY THE FEDERAL COPYRIGHT
ACT.

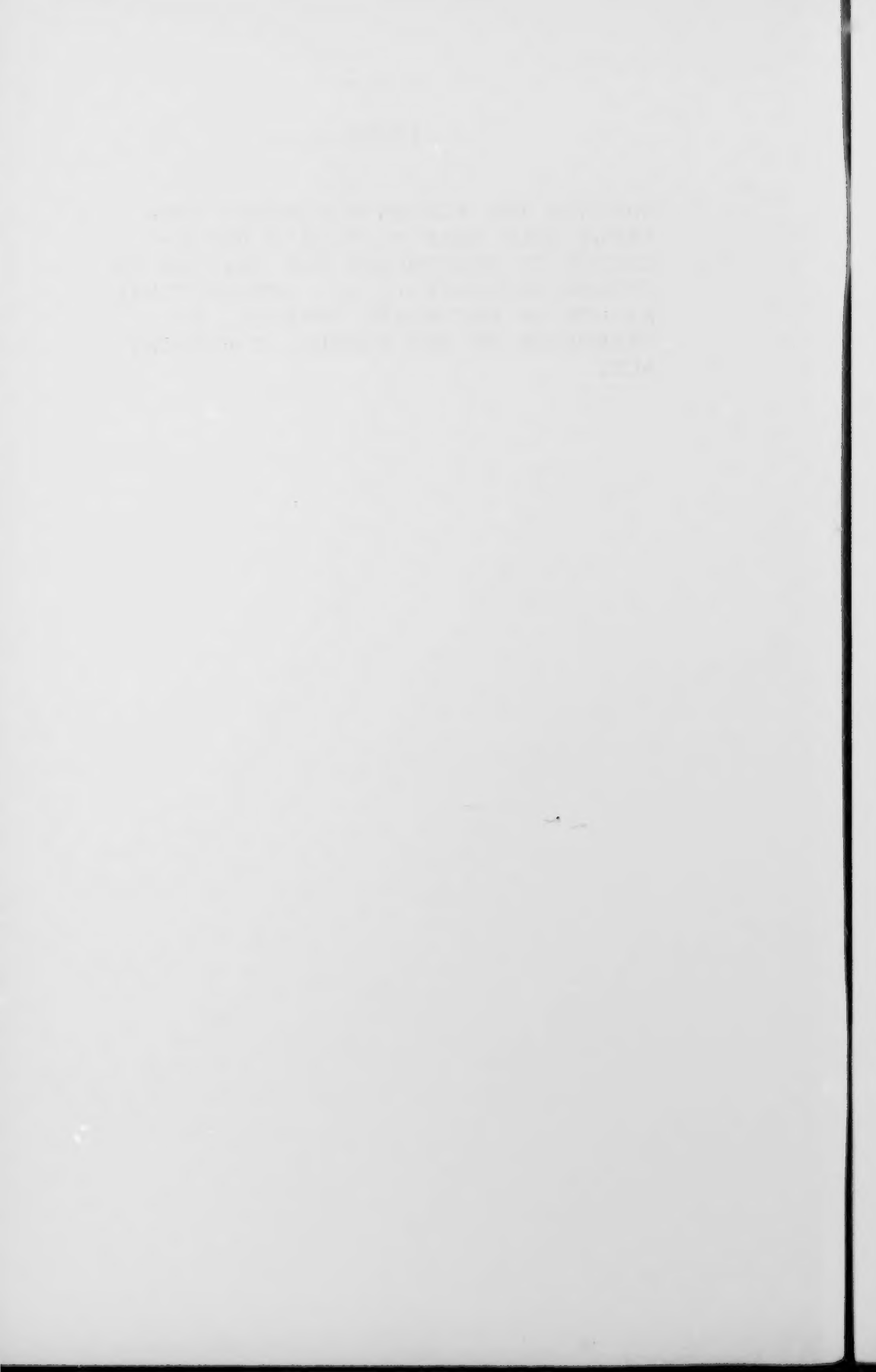


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LOUIE L. WAINWRIGHT,
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-v-

ROBERT LARRY CROW,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

The Attorney General of the State of Florida petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion on direct appeal from respondent's conviction is reported as Crow v. State, 392 So.2d 919 (Fla. 1st DCA

1980). The Florida Supreme Court's order denying respondent's petition to review that decision is reported as Crow v. State, 399 So.2d 1141 (Fla. 1981).

The opinion of the Court of Appeals, Eleventh Circuit, is reported as Crow v. Wainwright, 770 F.2d 1224 (11th Cir. 1983).

JURISDICTIONAL STATEMENT

The judgment of the Eleventh Circuit Court of Appeals was entered on December 2, 1983. Petition for Rehearing was denied on January 23, 1984.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND OTHER PROVISIONS
INVOLVED

Article VI §2 of the United States
Constitution provides:

This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

17 U.S.C. § 301 provides:

(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 [17 USCS § 106] in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103 [17 USCS §§ 102 and 103], whether created before or after that date and whether published or unpublished, are governed exclusively by this title [17 USCS §§ 101 et seq.]. Thereafter, no person is entitled to any such

right or equivalent right in any such work under the common law or statutes of any State.

(b) Nothing in this title [17 USCS §§ 101 et seq.] annuls or limits any rights or remedies under the common law or statutes of any State with respect to--

(1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103 [17 USCS §§ 102 and 103], including works of authorship not fixed in any tangible medium of expression; or

(2) any cause of action arising from undertakings commenced before January 1, 1978; or

(3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 [17 USCS § 106].

(c) With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title [17 USCS §§ 101 et seq.] until February 15, 2047. The preemptive provisions of subsection (a) shall apply to any such rights and remedies pertaining to any cause of action arising from

undertakings commenced on and after February 15, 2047. Notwithstanding the provisions of section 303 [17 USCS § 303], no sound recording fixed before February 15, 1972, shall be subject to copyright under this title [17 USCS §§ 101 et seq.] before, on, or after February 15, 2047.

(d) Nothing in this title [17 USCS §§ 101 et seq.] annuls or limits any rights or remedies under any other Federal statute.

Section 812.019, F.S., provides:

(1) Any person who traffics in, or endeavors to traffic in, property that he knows or should know was stolen shall be guilty of a felony or the second degree, punishable as provided in ss. 775.082, 775.083, and 775.084.

Section 812.012(3)(b), F.S., provides:

(3) "Property" means anything of value, and includes:

* * *

(b) Tangible or intangible personal property, including rights, privileges, interests, and claims.

STATEMENT OF THE CASE

A. History of the Case

Respondent was convicted and sentenced to a term of five years for the crime of dealing in stolen property, which consisted of "royalty rights and/or services" of several popular singers, in violation of § 812.019, F.S. The District Court of Appeal, First District, affirmed the judgment and sentence, 392 So.2d 919. Respondent petitioned the Florida Supreme Court to accept certiorari jurisdiction to review the opinion of the First District Court of Appeal. The Florida Supreme Court denied the petition on May 5, 1981. 399 So.2d 1141.

Petition for writ of habeas corpus was filed in federal district court on June 18, 1981. A report and recommendation was issued on January 27, 1982, recommending that

the petition should be denied on the merits. After an objection was filed by respondent, and a de novo review of the entire record was had, the petition was denied by the Honorable John H. Moore, II, United States District Judge.

On appeal, the Eleventh Circuit Court of Appeals reversed the lower court's denial of the petition and held that the prosecution of respondent was federally preempted. Petition for rehearing was denied on January 23, 1984.

B. Statement of the Facts

Respondent sold an unauthorized 8-track tape recording of an album by Tammy Wynette entitled "Golden Ring." The copyright to the album was the property of Columbia Broadcasting System, pursuant to a contract between Wynette and CBS dated January 1,

1975. Wynette was to receive monies from CBS for each copy of the recording sold.

Respondent did not contest the fact that he knowingly sold an unauthorized copy of the tape without paying royalties to CBS or compensation to Wynette.

REASONS FOR GRANTING THE WRIT

By an expansive reading of 17 U.S.C. § 301(a), the Eleventh Circuit Court of Appeals incorrectly held that the state prosecution for dealing in stolen property, i.e., contractual rights belonging to recording artists, was preempted by the federal copyright act.

In affirming respondent's direct appeal, the First District Court of Appeal stated:

[T]he appellant was not charged with engaging in "bootleg" activities. Instead, he was charged with dealing in stolen royalty rights and/or services, which belonged to various performers, not under federal copyright law, but under various private contracts. These private contractual rights constitute property, see Section 812.012(3)(b), Florida Statutes, that are not within the ambit of the federal copyright law.

Crow v. State, 392 So.2d 919, 920 (Fla. 1st DCA 1980).

This Court made it clear in Goldstein v. California, 417 U.S. 546 (1973), that, to the extent that the federal copyright act leaves an area unregulated, the states are free to legislatively protect recordings from record piracy. The recording in Goldstein, supra, was fixed prior to the effective date of the legislation which respondent herein argues preempted his state prosecution. However, the principle of Goldstein applies. The federal legislation does not regulate those contractual rights still retained by an artist after the copyright has been sold to a recording company. Tammy Wynette still held the contractual right to be paid for each copy of her work sold. By petitioner's act, he deprived her of those monies, and thus dealt in stolen property. This property can be protected by state legislation.

The lower court held that 17 U.S.C. § 301(a) clearly evinced Congress' intent to statutorily overrule Goldstein v. California. The petitioner disagrees. A federal court's duty has always been to reconcile federal law with the states' statute, if possible. Merrill Lynch, Pierce, Fenner & Smith v. Ware, 414 U.S. 117 (1973).

The right retained by the artist is a contractual one. Wynette had exchanged her copyright for a contractual right to receive money. If an interloper interferes with that contractual right, such that the artist does not receive her contractual payment, he has deprived her of a valuable commodity which is defined by common law.

In Aronson v. Quick Point Pencil Company, 440 U.S. 257 (1979), the inventor of a novel key chain sued the company who

agreed to make the key chain, for royalties, even though the inventor was unable to get a patent for the product. This court stated:

Commercial agreements traditionally are the domain of state law. State law is not displaced merely because the contract relates to intellectual property which may or may not be patentable. States are free to regulate the use of such intellectual property in any manner not inconsistent with federal law.

Id. at 262.

The Eleventh Circuit properly found that Section 301 provides a two-pronged test for preemption.

1) Whether the work in question is within the subject matter.

2) Whether the rights are the equivalent to those protected by the federal legislation.

The court concluded that the contractual rights here which were the subject of the prosecution below met both tests. As in

Aronson, supra, the rights were contractual and not within the subject matter of the act. Thus, the Eleventh Circuit erred in finding that the first test was satisfied. Secondly, the copyright had been sold to CBS, and it was the remaining contract rights which were the subject of the prosecution, not rights equivalent to copyright.

The Eleventh Circuit held that the contractual rights of the artist which she still retained, are equivalent to those protected by the federal copyright act. The court took this position on the basis of the fact that Crow could not be sued in contract by the copyright holder. The court characterizes the property rights as those of CBS "to distribute copies or phono records of the copyrighted work" and "to reproduce the copyrighted work." 17 U.S.C.

§ 106(1) and (3) (1976). Such a description of the property Crow "dealt in" falls wide of the mark. Respondent was not charged with dealing in the property of CBS. Wynette had sold CBS the rights described above. Simply because the property Wynette "sold" is defined by federal legislation cannot transform the money she received for that property, into the equivalent of copyright.

The Eleventh Circuit cites an example. If the recording was not protected, but CBS had agreed to pay an amount for every sale of her work, then the hypothetical states that there is no property to be stolen and thus a state prosecution would be impossible. This is not so. The artist has been injured in her ability to recover under the contract and she may sue in tort for intentional interference with a

business relationship. See Wackenhut Corp. v. Maimone, 389 So.2d 656 (Fla. 4th DCA 1980); John Reid and Associates, Inc. v. Jimenez, 181 So.2d 575 (Fla. 3d DCA 1965). Florida has acknowledged such interference is depriving a payee of a valuable right. The prosecution for dealing in such property is not preempted.

There is a substantial public interest recognized by the State of Florida in prosecuting persons dealing in this type of stolen property. The right to receive monies for each copy of a work sold provides the incentive for the production of that work. In Zacchini v. Scripps-Howard Broadcasting Company, 433 U.S. 562 (1977), the owner of a circus act sued a television station for filming his act without permission, claiming that the filming violated his "right to publicity." The plaintiff

claimed that he had been deprived of a "valuable part of the benefit which may be attained by his talents and efforts." Id. at 569. This court acknowledged the state's interest in protecting the "economic incentive for him to make the investment required to produce the performance of interest to the public." Id. at 576.

The First Circuit has recognized what the Eleventh Circuit has not:

[That] Supreme Court cases of the last decade demonstrate a new solicitude toward state interests and an elevation of the threshold of conflict required before a state statute is preempted.

Agency Rent-a-Car, Inc. v. Connolly, 686 F.2d 1029, at 1038 (1st Cir. 1982).

It is imperative that this Court address the issue here presented. The preemption of a state prosecution intended to protect the interests of its citizens is a severe step, and we contend an unnecessary one.

CONCLUSION

For these reasons, petitioner respectfully urges this Court to grant certiorari and reverse the holding of the Circuit Court of Appeals for the Eleventh Circuit.

JIM SMITH
Attorney General

By GREGORY C. SMITH
Assistant Attorney General

COUNSEL FOR PETITIONER

The Capitol
Tallahassee, FL 32301-8048
(904) 488-0290

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of April, 1984, copies of this Petition for Writ of Certiorari were mailed, postage prepaid, to Ms. Elizabeth L. White, and to Mr. William J. Sheppard, Law Offices of William J. Sheppard, P.A., 215 Washington street, Jacksonville, Florida 32202, Counsel for Respondent. I further certify that all parties required to be served have been served.

GREGORY C. SMITH
Assistant Attorney General
of Counsel

APPENDIX

1a

Robert Larry CROW, Petitioner,

v.

**Louie L. WAINWRIGHT, Secretary
Department of Corrections, State
of Florida, Respondent.**

No. 82-3158.

**United States Court of Appeals,
Eleventh Circuit.**

Dec. 2, 1983.

**Appeal from the United States District
Court for the Middle District of Florida.**

**Before TJOFLAT and HILL, Circuit
Judges, and SIMPSON, Senior Circuit Judge.**

JAMES C. HILL, Circuit Judge:

Robert Larry Crow appeals to this court from the district court's denial of his petition for a writ of habeas corpus. The State of Florida tried Crow in October, 1979, for selling "bootleg" eight-track tapes in violation of Fla.Stat.Ann.

§ 812.019 (West Supp. 1983) (prohibiting dealing in stolen property). The jury con-

victed Crow, and the trial judge sentenced him to five years in prison. Crow contends that we should hold the state conviction null and void because the Copyright Act, 17 U.S.C. § 101 **et seq.** (1976) (the "Act"), preempts Florida's regulation of his activities in this case. Crow's contention is valid; we therefore reverse this case and remand it to the district court with instructions to grant the writ of habeas corpus.

The evidence at trial revealed that Crow, on April 25, 1979, sold an eight-track tape recording of an album by Tammy Wynette entitled "Golden Ring." Columbia broadcasting System (CBS) owned the copyright to the album by virtue of a contract between Wynette and CBS dated January 1, 1975; the album was copyrighted in 1976. Crow does not contest the jury's findings

that he "pirated" the recording and sold the tape without paying royalties to CBS. He argues simply that, because the only "stolen property" involved in the case was the copyright of CBS (and not the physical tape itself), the Copyright Act precludes Florida from prosecuting him and renders his conviction void. The state trial and appellate courts rejected this claim. **See Crow v. State**, 392 So.2d 919 (Fla. Dist. Ct. App. 1980), **aff'd**, 399 So.2d 1141 (Fla. 1981). Having exhausted his state remedies, Crow is properly before this court.

Section 301 of the Act controls our decision. It states:

On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 and works of authorship that are fixed in a tangible medium of

expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any state.

17 U.S.C. § 301(a) (1976). The legislative history of section 301, which Congress passed in 1976, clearly evidences Congress' intent to overrule by statute cases such as **Goldstein v. California**, 412 U.S. 546, 93 S.Ct. 2303, 37 L.Ed.2d 163 (1973) (holding that the Copyright Act of 1909 preempts only state laws **conflicting or interfering with its provisions**). The Report of the House of Representatives states:

The intention of section 301 is to preempt and abolish any rights under the common law or statutes of a state that are **equivalent to copyright** and that **extend to works coming within the scope of the federal copyright law**. The de-

claration of this principle in section 301 is intended to be stated in the clearest and most unequivocal way possible, so as to foreclose any possible misinterpretation of its unqualified intention that Congress should act preemptively, and to avoid the development of any vague borderline area as between State and Federal protection.

H.R.Rep. No. 94-1476, 94th Cong., 2d Sess.

130 (1976), reprinted in 1976 U.S.Code

Cong. & Ad.News 5659, 5746. Thus, we must

determine in this case not whether

Florida's prosecution of Crow conflicts

with the provisions of the Copyright Act,

but whether Crow's actions violated rights

"equivalent to any of the exclusive rights

within the ... scope of copyright" 17

U.S.C. § 301(a); see also *Ray v. Atlantic*

Richfield Co., 435 U.S. 151, 157, 98 S.Ct.

988, 994, 55 L.Ed.2d 179 (1978) (court must

determine whether Congress has "explicitly

preempted state laws).

Section 301 in effect establishes a two-pronged test to be applied in preemption cases.¹ We must decide whether the rights at issue fall within the "subject matter of copyright" set forth in sections 102 and 103 and whether the rights at issue are "equivalent to" the exclusive rights of section 106. **Harper & Row, Publishers v. Nation Enters.**, 501 F.Supp. 848, 850 (S.D.N.Y. 1980). The recording "Golden Ring" certainly falls within the scope of section 102(a)(7), which provides copyright protection for "sound recordings." Thus, we need only determine whether the rights at issue are equivalent to section 106 rights.

The state supports its argument that it can constitutionally² prosecute Crow by attempting to characterize the stolen property rights as contract rights not within

the exclusive scope of section 106. These rights, argues the state, "'belong to various performers, not under federal copyright law but under various private contracts.'" Brief of Appellee at 4, citing **Crow v. State**, 392 So.2d 919, 920 (Fla. Dist. Ct. App. 1980). We do not accept this argument. CBS, the copyright holder, cannot maintain an action against Crow under state contract law because Crow was not a party to the contract by which CBS purchased the rights to "Golden Ring" from Wynette. Conversely, Crow neither sold nor purchased a right of action under the CBS/Wynette contract. The stolen property rights sold by Crow were the rights of CBS exclusively "to distribute copies or phono records of the copyrighted work" and "to reproduce the copyrighted work." 17 U.S.C. § 106(1) & (3) (1976 Supp. I). Given the

fact situation in this case, the Copyright Act clearly affords CBS its sole remedy should it bring an action against Crow.

An example illustrates this point. Suppose the recording "Golden Ring" could not have been copyrighted but that CBS nevertheless, for purposes of this example, contracted to pay Wynette a royalty for each tape sold. Without the protection of the Act, CBS would have no action against Crow. Although state contract law could constitutionally supply the rule of decision should Wynette sue CBS for breach of contract, see *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 799 S.Ct. 1096, 59 L.Ed.2d 296 (1979), state contract law both could not and would not allow CBS to prohibit Crow from selling recordings of "Golden Ring." See *Harper & Row*, 501 F.Supp. 848.

The proper method of analysis is to examine whether the elements of a cause of action for the tort of copyright infringement are equivalent to the elements of the crime of dealing in stolen property as it applies in this case. See 1 Nimmer on Copyright, § 1.01[b]. Despite the name given the offense, the elements essential to establish a violation of the Florida statute in this case correspond almost exactly to those of the tort of copyright infringement. The state criminal statute differs only in that it requires the prosecution to establish scienter, which is not an element of an infringement claim, on the part of the defendant. This distinction alone does not render the elements of the crime different in a meaningful way.³ Section 506 of the Copyright Act, which sets forth criminal penalties for copyright

infringement, also requires the prosecution to prove scienter as an element of the case. See **United States v. Smith**, 686 F.2d 234 (5th Cir. 1982). The additional element of scienter traditionally necessary to establish a criminal case merely narrows the applicability of the statute. The prohibited act--wrongfully distributing a copyrighted work--remains the same. See **Harper & Row**, 501 F.Supp. at 853-54 ("additional elements of 'knowledge' and 'intent' required under state law do not afford ... rights ... 'different in kind' from those protected by the copyright laws").⁴

Section 301 clearly prohibits Florida from prosecuting Crow in this case, and we conclude that Crow's conviction is null and void. We therefore REVERSE this case and REMAND it to the district court with in-

structions to grant the writ of habeas corpus.

¹ Section 301 applies only to violations occurring after January 1, 1978; it also applies only to rights "fixed in a tangible medium of expression" after February 15, 1972. 17 U.S.C. § 301 (1976). These requirements are satisfied in this case. The evidence at trial showed that the sale of the bootleg tape occurred in 1979 and that the recording was "fixed in a tangible medium of expression" and copyrighted after 1972.

² If section 301 prohibits the state from prosecuting Crow, the Supremacy Clause of the United States Constitution will render the conviction void. U.S. Const., art. VI, § 2.

³ Professor Nimmer also reaches this conclusion. He states, "state record piracy laws are preempted in their application to ... sound recordings under the rules set forth in section 301(a)." 1 Nimmer on Copyright, § 101[b] (footnote omitted) (citing section 653h of the California Penal Code).

⁴ In **Roy Export Co. v. CBS**, 503 F.Supp. 1137 (S.D.N.Y. 1980), **aff'd**, 672 F.2d 1095 (2d Cir.), **cert. denied**, ___ U.S. ___, 103 S.Ct. 60, 74 L.Ed.2d 63 (1982), the court held that section 301 of the Copyright Act does not preempt the New York law of unfair competition because the New York law re-

quires the plaintiff to allege unfairness and an unjustifiable attempt to profit from another's expenditure of time, labor and talent in order to state a cause of action. The logic underlying this decision has been questioned. See 1 Nimmer on Copyright, 1.01[b][1]. In any event, the court in **Roy Export** addressed the preemption of an unfair competition law, and **Roy Export** therefore does not control the decision in this case.

NO. 82-3158

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ROBERT LARRY CROW,
Appellant,

-v-

LOUIE L. WAINWRIGHT,
Secretary, Department of
Corrections, State of
Florida,
Appellee.

On Appeal from the United States
District Court
For the Middle District of Florida
Jacksonville Division

PETITION FOR REHEARING

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CERTIFICATE OF INTERESTED PERSONS

The persons interested in this case
are:

Appellant Robert Larry Crow

Appellee, Louie L. Wainwright, Secretary,
Department of Corrections, State of
Florida

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PETITION FOR REHEARING

Appellee, Louis L. Wainwright,
Secretary of the Department of Corrections,
State of Florida, petitions this court to
rehear the decision rendered by this court
on December 2, 1983. In support of this
request, the state would demonstrate that
in deciding this case, this court over-
looked or misapprehended certain issues
which are hereby offered for consideration.

Upon reading the opinion of this court,
it is clear that this court focused on the
rights of the copyright holder, Columbia
Broadcasting System (CBS). This court
stated:

The state supports its argument
that it can constitutionally pro-
secute Crow by attempting to char-
acterize the stolen property rights
as contract rights not within the
exclusive scope of § 106. These
rights, argues the state, "belong
to various performers, not under
federal copyright law but under

various private contracts.'" Brief 2d 919, 920 (Fla.Dist.Ct.App. 1980). We do not accept this argument. CBS, the copyright holder, cannot maintain an action against Crow under state contract law because Crow was not a party to the contract by which CBS purchased rights to the "golden ring" from Wynette. Conversely, Crow neither sold nor purchased a right of action under the CBS/Wynette contract. The stolen property rights sold by Crow were the rights of CBS exclusively "to distribute copies of phono records of the copyrighted work" and "to reproduce the copyrighted work."

Instead, the State of Florida argues that the contract rights of the artist, Tammy Wynette, were the subject of the state prosecution. The State of Florida charged appellant with trafficking in stolen property. The state appellate court concluded that the rights of Tammy Wynette to monies for each recording sold, amounted to property which could be the subject of the state prosecution. The question of

whether CBS has been deprived of rights under a contract was never addressed, and this court's opinion misconstrues the state's argument.

In Aronson v. Quick Point Pencil Company, 440 U.S. 57 (1979), the Supreme Court stated:

Commercial agreements are traditionally the domain of state law. State law is not displaced merely because the contract relates to intellectual property which may or may be patentable. States are free to regulate the use of such intellectual property in any manner not inconsistent with federal law.

Id. at 262. The State of Florida had the right to prosecute appellant for dealing in the stolen property of another, Tammy Wynette's contract right to receive compensation from the sale of the recording. The United States Supreme Court has recognized the state's interest in protecting such rights when to do so does not interfere

with federal legislation. Goldstein v. California, 412 U.S. 546 (1973).

In Agency Rent-a-Car, Inc. v. Connolly, 686 F.2d 1029 (1st Cir. 1982), the First Circuit Court of Appeals recognized that the recent Supreme Court cases "demonstrate a new solicitude toward state interests and an elevation of the threshold of conflict required before a state statute is pre-empted." Id. at 1038. This court should reexamine its opinion in light of Agency Rent-a-Car, since the state statute here can peacefully coexist with the federal copyright law.

Recently, there have been several state prosecutions for stealing or dealing in the property rights of recording artists. The state would list the three cases known to it where the state has upheld such a prosecution.

1. People of the State of California v. Leslie Szarvas, California Superior Court, Pasadena, conviction entered 1/29/82
2. People of the State of Illinois v. Salem Arsham Zakarian, Wahi Karabit, Faried Saba, Cook County Municipal Court, Chicago, convicted on 4/20/82
3. People of the State of New York v. William Kamarra, Sup.Ct. of State of N.Y., County of Queens, convicted on 11/15/83

In each of these cases it was held that the defendant was guilty of larceny by his manufactured distribution of pirated post-1972 sound recordings, which thereby resulted in a theft of royalties due the artist whose performances were illegally produced thereon.

CONCLUSION

Appellee, Louie L. Wainwright, respectfully requests this Honorable Court rehear the opinion rendered on December 2,

1983, so that a reexamination of the case can be made in the perspective that the rights stolen were those due Tammy Wynette, not the copyright holder, CBS. In that perspective, appellee would maintain that this court should allow the state prosecution for trafficking in stolen property; contract rights due Tammy Wynette.

JIM SMITH
Attorney General

s/s _____
GREGORY C. SMITH
Assistant Attorney General

COUNSEL FOR APPELLEE

The Capitol
Tallahassee, FL 32301-8048

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished a copy of the foregoing Petition for Rehearing to Ms. Elizabeth L. White, and Mr. William J. Sheppard, Law Offices of

22a

William J. Sheppard, P.A., 215 Washington
Street, Jacksonville, Florida 32202, by

.S. Mail, this 21st day of December, 1983.

s/s

GREGORY C. SMITH

Assistant Attorney General

of Counsel

Robert Larry CROW, Appellant,

v.

STATE of Florida, Appellee.

No. SS-321.

**District Court of Appeal of Florida,
First District.**

Nov. 17, 1980.

Rehearing Denied Feb. 13, 1981.

**Nancy A. Daniels, Asst. Public Defender,
Tallahassee, for appellant.**

**Jim Smith Atty. Gen. and Doris E.
Jenkins, Asst. Atty. Gen., Tallahassee, for
appellee.**

THOMPSON, Judge.

The appellant was charged with traffick-
ing in stolen property, which consisted of
the "royalty rights and/or services" of sev-
eral popular singers. After a jury trial,
the appellant was convicted and he now ap-
peals his conviction. We affirm.

[1] The appellant initially argues that the State's prosecution of this case was unconstitutional because the activity of dealing in "bootlegged" tape recordings is controlled exclusively by federal copyright laws. See 17 U.S.C. §§ 106-118, 301, 501-510. However, the appellant was not charged with engaging in "bootleg" activities. Instead, he was charged with dealing in stolen royalty rights and/or services, which belonged to various performers, not under federal copyright law, but under various private contracts. These private contractual rights constitute property, see §812.012(3)(b), Fla.Stat., that are not within the ambit of the federal copyright law.

[2] The appellant also argues that because the State failed to file an information until 149 days after his arrest, his right to due process was abrogated. However, the ap-

pellant failed to move for a continuance chargeable to the State. **See Mulryan v. Judge, Division "C" Circuit Court of Okaloosa County**, 350 So.2d 784 (Fla. 1st DCA 1977); **State ex rel. Wright v. Yawn**, 320 So.2d 880 (Fla. 1st DCA 1975), **cert. den.** 334 So.2d 609 (Fla. 1976). Instead, the appellant filed a written document with the court, wherein he stated that he waived his right to move for a continuance, "notwithstanding that his attorney has advised him that he should move to continue the cause until he has had the opportunity to properly prepare the case for trial." Accordingly, the appellant cannot properly complain on this appeal that his right to due process has been denied, since his waiver of his right to a continuance was clearly not coerced. **See Sumbry v. State**, 310 So.2d 445 (Fla. 2d DCA 1975).

We have considered the other points raised by the appellant and find them to be without merit. Therefore, the judgment of conviction is affirmed in its entirety.

MILLS, C. J., and McCORD, J., concur.

